



Case Western Reserve Law Review

Volume 62 | Issue 2

2011

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Recommended Citation

Amanda McHenry, *The NLRB Wields Its Rulemaking Authority: The New Face of Representation Elections*, 62 Case W. Res. L. Rev. 589 (2011)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol62/iss2/8>

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THE NLRB WIELDS ITS RULEMAKING AUTHORITY: THE NEW FACE OF REPRESENTATION ELECTIONS

*“Big Labor has found faithful friends on the Obama N.L.R.B., who are working hard to fix a process that isn’t broken.”*¹

INTRODUCTION

In June 2011, a majority of the National Labor Relations Board (“NLRB” or “Board”) proposed radical revisions to its representation election procedures. The final rules were published in the Federal Register on December 22, 2011 and will take effect on April 30, 2012—less than one year after they were first proposed. The unprecedented controversy that followed the June announcement involved a two-day public Board meeting, legislation intended to block the undesirable effects of the proposed amendments, and at least one federal lawsuit. This latest—and radical—attempt at substantive rulemaking has left many observers questioning the legitimacy of the Board itself.

This Comment analyzes the substance of these amendments, their practical effect on all parties, and the reasons for their enactment. This Comment concludes that the amendments are unprecedented, sweeping, and unfair; they put employers at an extreme disadvantage in their ability to express their views about unionization, and, as a result, deprive employees of their right to make an informed decision. Part I provides a brief overview of the National Labor Relations Act (“NLRA”),² focusing on its main provisions; the NLRB, and its function as an adjudicative versus rule-making body; and finally, the NLRB’s existing representation election procedures. Part II then

¹ See Steven Greenhouse, *N.L.R.B. Rules Would Streamline Unionizing*, N.Y. TIMES, June 22, 2011, at B3 (quoting Representative John Kline commenting on recent amendments to NLRB representation election procedures).

² National Labor Relations Act, 29 U.S.C. § 151–169 (2006).

explores the significant decline in union membership and considers whether that decline can be attributed to an unfair election process. Part III details the substantive changes made to representation elections through the Board's amended election rules, as well as what the Board intends to accomplish with these new rules, and analyzes whether these new amendments effect a positive or negative change. Part III also analyzes the reaction to and controversy surrounding the proposed amendments and criticizes the Board's reasoning and its hasty decision-making process.

I. BRIEF OVERVIEW OF THE NLRA, NLRB, ITS ADJUDICATIVE VERSUS RULEMAKING FUNCTION, AND REPRESENTATION ELECTION

The NLRA is the principal law governing relations between labor organizations and private-sector employers engaged in interstate commerce.³

A. The NLRA Is Born and Its Constitutionality Is Upheld

The NLRA was enacted in 1935 with the passage of the Wagner Act.⁴ In order to promote commerce and alleviate industrial strife,⁵ the Act made explicit employees' rights to organize and bargain collectively. Specifically, the Act provided that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."⁶ The NLRA also affirmed employees' right to strike, curtailed private sector labor and management practices that could injure both individual employees and the national economy, prescribed the process for representation elections, created the NLRB, and provided for judicial enforcement and review of Board orders.⁷

³ GERALD MAYER, *UNION MEMBERSHIP TRENDS IN THE UNITED STATES* 1 (2004).

⁴ DOUGLAS E. RAY ET AL., *UNDERSTANDING LABOR LAW* 9 (3d ed. 2011).

⁵ See 29 U.S.C. § 141(b) (stating the purpose and policy of the Act); cf. RAY ET AL., *supra* note 4, at 10 ("Senator Wagner [author of the Act] primarily saw the Act as a weapon against the Depression, which he attributed to underconsumption caused by too unequal a distribution of wealth. Collective bargaining, he thought, would both restore an element of fairness and industrial democracy to the workplace, and redistribute wealth in such a way as to reinvigorate the economy.").

⁶ RAY ET AL., *supra* note 4, at 10 (quoting 29 U.S.C. § 157 (2000)).

⁷ See *id.* (citing 29 U.S.C. §§ 153–54, 158, 159, 160, and 163) (describing the principle features of the original Act); see also, *National Labor Relations Act*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/national-labor-relations-act> (last visited Dec. 29, 2011) (identifying the congressional motivations for the Act).

The Commerce Clause, which gives Congress the power “[t]o regulate Commerce . . . among the several States,”⁸ is the constitutional basis for the Act.⁹ Professor William B. Gould IV of Stanford Law School¹⁰ noted that “[t]he constitutional theory upon which the [Act] is predicated is that statutory regulation of labor and management is necessary to diminish industrial strife that could disrupt interstate commerce.”¹¹ The Supreme Court, in *NLRB v. Jones & Laughlin Steel Corporation*,¹² upheld the Act. Chief Justice Hughes’s majority opinion rejected the idea that labor relations had only an indirect effect on interstate commerce:

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, *how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter* when it is necessary to protect interstate commerce from paralyzing consequences of industrial war?¹³

Because the ability of employees to bargain collectively is “an essential condition of industrial peace,” the Court held that the national government was justified in penalizing employers that “[r]efus[ed] to confer and negotiate” with their employees.¹⁴

B. The NLRB

The NLRA is administered by the NLRB. The Board is principally charged with conducting representation elections and investigating unfair labor practices.¹⁵ However, the Board also has the power to adjudicate cases when the NLRB Administrative Judge decision is appealed.¹⁶ A panel of three Board members usually decides these cases; but the full Board will hear those that are “novel or potentially

⁸ U.S. CONST. art. I, § 8, cl. 3.

⁹ WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 28 (4th ed. 2004).

¹⁰ *Directory*, STANFORD LAW SCHOOL, <http://www.law.stanford.edu/directory/profile/26/> (last visited Mar. 3, 2012).

¹¹ GOULD, *supra* note 9, at 28.

¹² 301 U.S. 1 (1937).

¹³ *Id.* at 41 (emphasis added).

¹⁴ *Id.* at 42.

¹⁵ See National Labor Relations Act, 29 U.S.C. § 159(b) and (c); 160(a) (2006) (vesting in the Board powers related to the conduct of representation elections and the prevention of unfair labor practices); see also RAY ET AL., *supra* note 4, at 21–22 (detailing the primary functions of the Board).

¹⁶ *Decide Cases*, NAT’L LABOR RELATIONS BD., <http://www.nlr.gov/what-we-do/decide-cases> (last visited Mar. 6, 2012).

precedent changing.”¹⁷ Case-by-case adjudication is the primary method by which the Board exercises its policy-making authority.¹⁸

The Board is typically comprised of five members.¹⁹ Each member is appointed for a five-year term by the President, subject to Senate approval, with one member’s term expiring each year.²⁰ But when the Board amended its election procedures in 2011, the Republican-controlled Senate had blocked each of President Obama’s nominations and, as a result, the NLRB was composed of only three members.²¹ President Obama named Mark G. Pearce, already a Board member, Chairman after Wilma B. Liebman relinquished the position at the expiration of her term.²² Pearce’s term will expire in August 2013.²³ Brian Hayes, the only Republican Board member, will lose his position in December 2012.²⁴ The term of the third Board member, Craig Becker, a recess appointment,²⁵ expired in January 2012.²⁶ The composition of the Board is an important preface to a discussion of the Board’s revisions to its representation election procedures because the position taken by each member during the comment period bears on this Comment’s analysis that the revisions are largely defective.

¹⁷ *Id.*

¹⁸ See *infra* note 37 and accompanying text.

¹⁹ RAY ET AL., *supra* note 4, at 21.

²⁰ *Id.*; accord 29 U.S.C. § 153(a) (2006).

²¹ See *National Labor Relations Board*, N.Y. TIMES (Jan. 4, 2012), http://topics.nytimes.com/topics/reference/timestopics/organizations/n/national_labor_relations_board/index.html [hereinafter *Times Topics*] (discussing a twenty-six month period in which Democrats and Republicans blocked each others’ Board nominees).

²² *Mark G. Pearce*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/board/mark-g-pearce-chairman> (last visited Mar. 3, 2011); *Times Topics*, *supra* note 21.

²³ *Mark G. Pearce*, *supra* note 22.

²⁴ *Brian Hayes*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/board/brian-hayes> (last visited Mar. 3, 2011).

²⁵ Recess appointments are temporary Presidential appointments made when the Senate is not in session. HENRY B. HOGUE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 1 (2011). The terms of recess appointees are temporary, however, and expire at the end of the next session. *Id.*

²⁶ *Board Members Since 1935*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/who-we-are/board/board-members-1935> (last visited Mar. 3, 2012) (indicating that Member Becker served until January 3, 2012). On January 4, 2012, President Obama bypassed the Senate advise-and-consent process and extreme Republican opposition by making three recess appointments to the Board. Rick Manning, *Obama’s Extraconstitutional NLRB Appointments*, THE HILL (Jan. 5, 2011), <http://thehill.com/blogs/pundits-blog/the-judiciary/202617-obamas-extraconstitutional-nlr-b-appointments>. He acted while Congress, which had been meeting in intermittent sessions to prevent this very result, was away for holiday break. Lisa Mascaro, *Bypassing Congress, Obama will appoint three to NLRB*, L.A. TIMES, (Jan. 4, 2012), <http://articles.latimes.com/2012/jan/04/news/la-pn-obama-nlr-b-recess-appointments-20120104>.

1. The NLRB's Rulemaking Authority

The Board undoubtedly possesses substantive rulemaking power. This power is rooted in section 156 of the Act: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act],²⁷ such rules and regulations as may be necessary to carry out the provisions of this [Act]."²⁸ In *American Hospital Association v. NLRB*, a unanimous Court upheld the Board's substantive rulemaking authority.²⁹ In that case, the Board had promulgated a rule to define the scope of collective bargaining units in healthcare facilities.³⁰ The Court held that the Board's "broad rulemaking" powers³¹ under section 156 were "unquestionably sufficient to authorize the rule at issue."³² In sustaining the rule, the Court noted the "extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule."³³

The Board also has broad discretion to choose whether to exercise its rulemaking authority or rely exclusively on adjudication.³⁴ As one commentator explained, "[this choice] probably does not reflect a straight-forward effort to identify the method that will produce the best substantive decision. The agency will be primarily concerned with choosing a policy-making method that will allow it to be efficient and yet survive judicial review."³⁵ Nevertheless, courts defer to this choice because they understand that agencies, given the minefield in which they must operate, are in the best position to

²⁷ The Administrative Procedures Act prescribes extensive procedural requirements. First, general notice of the proposed rule must be published in the Federal Register. Administrative Procedure Act, 5 U.S.C. § 553(b) (2011). After the notice is published, the agency must provide interested persons a reasonable period of time to comment on the proposed rules. *Id.* at § 553(c). Finally, after consideration of the comments, the agency must finalize the rule and incorporate in the rule a concise statement of its basis and purpose. *Id.*

²⁸ National Labor Relations Act, 29 U.S.C. § 156 (2006).

²⁹ 499 U.S. 606, 606 (1991).

³⁰ *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 608 (1991). *See* Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16,336 (April 21, 1989) (to be codified as 29 C.F.R. pt. 103) for a full text of the final health care rule.

³¹ 499 U.S. at 613.

³² *Id.* at 610.

³³ *Id.* at 618; *see also* Claire Tuck, Note, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 CARDOZO L. REV. 1117, 1132–35 (2005) (examining the success of the health care collective bargaining unit rule—the last major substantive rulemaking issued by the Board).

³⁴ *See* *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) ("[T]he Board has discretion to decide that the adjudicative procedures in this case may also produce the relevant information necessary to mature and fair consideration of the issues.").

³⁵ Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, FLA. ST. U. L. REV. 529, 531 (2005).

choose the appropriate course of action.³⁶ Notably, the NLRB has relied almost exclusively on case-by-case adjudication.³⁷ In enacting comprehensive changes to its representation election rules, the Board disregarded this self-imposed tradition.

2. A Preliminary Analysis: Rulemaking as a Superior Law-Making Mechanism

Many commentators recommend that the Board enact more law through formal rulemaking instead of case-by-case adjudication.³⁸ In particular, rulemaking would produce stability and confidence in Board rules, ensure political accountability, and enhance policy making.

The primary benefit of rulemaking is that it would produce stability and confidence in Board rules. Adjudication provides little guidance to regulated parties or the agency itself. As one commentator observed, “[u]nless the adjudicatory decision is distorted with dictum on situations not involved in the case being decided, both agency and regulated public must resort to reading a line of cases and formulating from them a statement of the principles or policies followed by the NLRB with respect to a particular matter.”³⁹ Rulemaking would enable laypersons and lawyers alike to understand and adhere to Board rules.⁴⁰ The process would also give those subject to the rules greater confidence that the rules will not transform with each new administration.⁴¹

³⁶ *Id.* at 532.

³⁷ See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 412 (2009) (“[I]n the past 20 years, the Board has issued a smattering of procedural, privacy, and housekeeping rules—mostly as final rules—and has used the notice-and-comment process only 17 times.”); Rachlinski, *supra* note 35, at 530 (“Some agencies, notably the National Labor Relations Board (NLRB), make policy largely through the adjudication process.”).

³⁸ See, e.g., Lubbers, *supra* note 37, at 435 (“The NLRB should reconsider its longstanding antipathy toward rulemaking.”); *cf.* Tuck, *supra* note 33, at 1140 (“[B]ecause of increasing opposition from Congress, problems resulting from the judicial review process, partisan divisions at the NLRB itself, and the lack of well-developed precedents for controversial issues, rulemaking at the NLRB is currently not feasible for controversial, substantive issues.”).

³⁹ Cornelius J. Peck, *A Critique of the National Labor Relations Board’s Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 272 (1968).

⁴⁰ See *id.* (“[T]o the extent possible the Board should try to be of service to non-specialists, whether laymen or lawyers.”).

⁴¹ See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 A.B.A. J. LAB. & EMP. L. 1, 13–14 (2009) (“NLRB policy reversals—which come with each new administration as surely as spring follows winter—is another area where properly employed rulemaking would enhance the confidence of the parties that acting in conformity with preexisting Board law will not result in adverse remedial consequences.”); Lucas R. Aubrey, *NLRB Decisions and the Role of Precedent*, LAB. & EMP. LAW, Winter 2010, at 3 (“A switch to resolution of significant policy disputes through formal rulemaking might reduce the perceived flip-flopping in board law.”).

The rulemaking process would also ensure political accountability. It may be unclear, in the course of a particular adjudication, whether the Board is making an important policy decision.⁴² Conversely, if it were to utilize rulemaking, the Board could not avoid political accountability by masquerading important policy decisions as facts specific to an individual adjudication.⁴³

The Board's use of formal rulemaking, therefore, would be a welcome departure from its customary reliance on case-by-case adjudication. Indeed, some members of the public applauded the Board for its most recent use of the process to propose amendments to the representation election process. Professor Lofaso, for instance, said that "[t]he Board should be commended for acting under its statutory rulemaking authority to modernize outdated and confusing rules."⁴⁴ She also offered that "[t]his is good government acting at its best."⁴⁵ However, for the reasons set forth in Part III, the Board's use of rulemaking with respect to its representation election procedures was defective, or at least inadequate.

C. Representation Elections

Employees have the right to unionize or, alternatively, to decertify a union when they no longer wish to be represented.⁴⁶ A primary and critical function of the NLRB is to conduct secret ballot elections to determine whether a majority of employees wish to be represented by a particular labor union.⁴⁷ Both unions and employers must adhere to intricate procedural requirements throughout the election process.⁴⁸ Because the NLRA itself provides little guidance as to election procedures, unions and employers must look instead to those Rules and Regulations that the Board has promulgated.⁴⁹ These requirements, as well as the resolution of pre- and post-election issues

⁴² Peck, *supra* note 39, at 272.

⁴³ Tuck, *supra* note 33, at 1126.

⁴⁴ NAT'L LABOR RELATIONS BD., PUBLIC MEETING ON PROPOSED ELECTION RULE CHANGES 11 (2011) [hereinafter PUBLIC MEETING] (statement of Anne Marie Lofaso).

⁴⁵ *Id.* at 36.

⁴⁶ *Employee Rights*, NAT'L LABOR RELATIONS BD., <https://www.nlr.gov/rights-protect/employee-rights> (last visited Mar. 6, 2012).

⁴⁷ See RAY ET AL., *supra* note 4, at 60 ("Typically, the method by which employees select a union, or choose not to be represented by one, is by a majority vote in a secret ballot election in an appropriate bargaining unit.").

⁴⁸ See *infra* Part I.C.3.

⁴⁹ RAY ET AL., *supra* note 4, at 60. The Rules and Regulations relevant to representation elections are codified in 29 C.F.R. §§ 102.60–102.72. The NLRB published its first series of Rules and Regulations in the Federal Register on April 18, 1936. See Representation—Case Procedures, 76 Fed. Reg. 80,138, 80,142 (Dec. 22, 2011) (to be codified as 29 C.F.R. pts. 101 and 102) [hereinafter *Final Amendments*].

concerning the appropriateness of the bargaining unit and conduct of the election, are set forth below.

1. Defining the Bargaining Unit

Only those units of employees with a “community of interest” are appropriate for unionization.⁵⁰ Among the factors that the Board considers in determining the appropriateness a particular bargaining unit are: (1) “whether the employees are under common supervision”; (2) “on what basis the employees have communicated or bargained in the past”; (3) “whether the employees have contact with one another at the workplace and whether, for instance, they clock in and clock out at the same location”; (4) “similarity in the type of work performed”; (5) “similarities in wages, hours, and working conditions”; and (6) “the desires of the employees.”⁵¹ Those employees with a supervisory status are excluded from the voting unit.⁵²

Unions possess a unique advantage in their ability to define the bargaining unit. Richard A. Epstein, professor at the New York University School of Law,⁵³ explained that “[u]nion support is not uniform in workplaces, and this power of unit designation allows the union to shrink or expand the unit in order to maximize its chances of overall success.”⁵⁴ Thus, defining the bargaining unit is a critical step in the representation election process.

2. Important Prerequisites to a Representation Election

Once the bargaining unit is defined, the union must file an election petition with the nearest Regional Office,⁵⁵ along with a “showing of interest” demonstrating that at least 30 percent of the employees in the proposed unit want the union in question to represent them.⁵⁶ The

⁵⁰ GOULD, *supra* note 9, at 40.

⁵¹ *Id.*

⁵² ROBERT LEWIS & WILLIAM A. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT’S STRATEGY AND PREVENTIVE PROGRAMS 156 (2d ed. 1979). Supervisory status is important because if a supervisor is included in the bargaining unit, and the union wins the election, that supervisor is covered by the contract. *Id.* at 157. On the other hand, “[w]ith the benefit of hindsight, the employer who has lost a close election may regret the day his caution influenced him to exclude these employees from the voting unit.” *Id.*

⁵³ *Faculty Profiles: Richard Epstein*, NEW YORK UNIVERSITY SCHOOL OF LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=26355> (last visited Mar. 3, 2012).

⁵⁴ RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 42 (2009).

⁵⁵ *Frequently Asked Questions—NLRB*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/faq/nlr> (last visited Mar. 3, 2012).

⁵⁶ RAY ET AL., *supra* note 4, at 61. The union could turn over as proof of substantial support through signed and dated authorization cards or a petition signed by the requisite

Regional Director then conducts a preliminary investigation to determine whether there is “reasonable cause to believe that a question of representation affecting commerce exists.”⁵⁷

If the Regional Director determines that the petition is properly supported, he or she serves the parties with a hearing notice, which is designed to resolve contested questions—such as when and where the election will occur, the appropriateness of the bargaining unit, and voter eligibility—before the election is conducted.⁵⁸ The hearing officer takes evidence in a non-adversarial hearing and forwards a transcript to the Regional Director.⁵⁹ The Regional Director then reviews the hearing record and any post-hearing briefs, issues findings and conclusions as to the contested issues, and either orders a representation election or dismisses the petition.⁶⁰

The employer, in turn, must provide the Board with an *Excelsior* list within seven days of the election order.⁶¹ This requirement is named after *Excelsior Underwear Incorporated. v. NLRB*,⁶² in which the Board held that an employer is obligated under section 158(a)—which prohibits an employer from interfering with or coercing employees in their right to unionize⁶³—to supply to the union upon request an accurate list of eligible voters’ names and addresses.⁶⁴ The *Excelsior* list is an important tool for the campaigning union, and, accordingly, this requirement is strictly enforced.⁶⁵ Even though section 158(a) limits what an employer may say to its employees during a campaign, the employer may explain to its employees that it was required by the Board to turn over the information contained in the *Excelsior* list.⁶⁶

number of employees. *Id.* (citations omitted).

⁵⁷ NLRB Rules and Regulations, 29 C.F.R. § 102.63(a) (2011).

⁵⁸ RAY ET AL., *supra* note 4, at 64. The union and employer may, and often do, resolve consensually all pre-election issues through a consent election agreement, subject to approval by the Regional Director. *Id.*

⁵⁹ *Id.* at 64–65 (citations omitted).

⁶⁰ *Id.* at 67.

⁶¹ *Id.*

⁶² 156 N.L.R.B. 1236 (1966).

⁶³ National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2006).

⁶⁴ 156 N.L.R.B. at 1239–40.

⁶⁵ RAY ET AL., *supra* note 4, at 67; *see also id.* at 85 (“Both anecdotal evidence and empirical studies have emphasized the importance of union contact with the bargaining unit employees to the chances of union success in an organizing campaign.”).

⁶⁶ LEWIS & KRUPMAN, *supra* note 52, at 162.

3. *The Representation Election*

The Act does prescribe some procedural details regarding the representation election process. Either party is entitled to have observers present.⁶⁷ The Employer may challenge a voter's eligibility to vote in the election, in which case the voter's ballot is merely separated from the others, and, if the Regional Director rules against the challenge, it is tallied along with the others.⁶⁸ Objections relating to the conduct of the election must be filed with the Regional Director within seven days of the election.⁶⁹ Once these objections are investigated and resolved,⁷⁰ the NLRB will certify that the union is, or is not, the collective bargaining representative of that particular unit.⁷¹ Finally, any party who disagrees with the Regional Director's pre- or post-election decision may request review by the Board within fourteen days after the election results are certified.⁷² Such review, however, is only allowed under a limited number of circumstances.⁷³

The Act does not specify, on the other hand, how soon after petitioning the election must be held. The Dunlop Commission observed in 1994 that the "median time from petitioning for an election to a vote has been roughly fifty days for the last two decades (down considerably from the time taken in the 1940s and 1950s)."⁷⁴ But the time lapse is even smaller today. In 2008, for instance, elections were held in a median of thirty-eight days.⁷⁵ Nevertheless, the length of the process remained a primary complaint for labor

⁶⁷ NLRB Rules and Regulations, 29 C.F.R. § 102.69(a) (2011) ("Any party may be represented by observers of its own selection.").

⁶⁸ RAY ET AL., *supra* note 4, at 67–68. The eligibility of a particular employee to vote may be challenged in that he is a supervisor, his job classification falls outside the bargaining unit, or he was previously discharged. *See* LEWIS & KRUPMAN, *supra* note 52, at 224 (discussing reasons why a potential voter may be challenged); *see also* 29 C.F.R. § 102.69(a) (2010) ("Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded.").

⁶⁹ 29 C.F.R. § 102.69(a) (2010).

⁷⁰ The Regional Director will order a rerun election if he or she finds that a valid objection has been raised. RAY ET AL., *supra* note 4, at 68; *see also* GOULD, *supra* note 9, at 46 ("The regional director will investigate but need not hold a hearing to determine the validity of the objections unless a party challenging the election shows through specific evidence relating to specific individuals material issues of fact sufficient to support a prima facie showing of objectionable conduct."). The original winner wins most rerun elections. LEWIS & KRUPMAN, *supra* note 52, at 238.

⁷¹ *Conduct Elections*, NAT'L LABOR RELATIONS BD., <http://www.nlrb.gov/what-we-do/conduct-elections> (last visited Jan. 2, 2012).

⁷² 29 C.F.R. § 102.67(b) (2010).

⁷³ *See* 29 C.F.R. § 102.67(c) (2010), for the circumstances under which the Board will grant review.

⁷⁴ Estreicher, *supra* note 41, at 5 (citation omitted).

⁷⁵ *Id.*; Greenhouse, *supra* note 1, at B3.

organizations and substantially motivated the recent amendments.⁷⁶ Samuel Estreicher, Professor at the New York University School of Law,⁷⁷ explained why the time lapse could be cause for concern for the following reason: “This [time lapse] is considered problematic because employee interest in collective representation can wane and dissipate simply by the passage of time. The gap in time before the election takes place also enables employers to reduce support for the union by running anti-union campaigns”⁷⁸

4. *How Employers and Unions Present Their Views*

Employees solicited by the union have heard only one side of the story and, consequently, it is important that the employer also be permitted to communicate with the proposed unit.⁷⁹ “[T]he Board itself,” observed one commentator, “has stressed that the opportunity for both sides, both the employer as well as the union, to reach all the employees is basic to a fair and informed election.”⁸⁰ Another commentator explained that employees should hear all the downsides of the unionization effort—“about union dues, fees, and assessments [about] the union’s political posture or social agenda.”⁸¹ Section 8(c) of the Act expressly protects an employer’s right to oppose unionization in that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.”⁸² Thus, provided an employer does not threaten or coerce its employees or promise a benefit, it may conduct an aggressive anti-unionization campaign.

Nonetheless, unions retain a significant advantage in the presentation of their views. As one commentator noted, “a union will be fully prepared to campaign before an election occurs, as the union controls when a representation election will happen.”⁸³ Professor

⁷⁶ See *infra* text accompanying note 78.

⁷⁷ *Faculty Profiles: Samuel Estreicher*, N.Y. UNIV. SCH. OF LAW, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=19902> (last visited Jan. 2, 2012).

⁷⁸ Estreicher, *supra* note 41, at 4–5.

⁷⁹ See LEWIS & KRUPMAN, *supra* note 52, at 70 (“An employer is entitled to oppose unionization, and may mount a legitimate campaign against it.”).

⁸⁰ PUBLIC MEETING, *supra* note 44, at 11 (statement of Arnold E. Perl).

⁸¹ *Id.* at 55 (statement of Peter Kirsanow); see also *id.* at 74 (statement of Michael Prendergast) (“[I]f [employees] don’t get those facts from the employers, they won’t get them anywhere else.”).

⁸² National Labor Relations Act, 29 U.S.C. § 158(c) (2006).

⁸³ PUBLIC MEETING, *supra* note 44, at 344 (statement of William Messenger).

Epstein further observed that “unions are *not* bound by the same restrictions that govern employer speech and thus are free to make promises, and often make threats against recalcitrant workers that are difficult to prove or counteract.”⁸⁴ Only unions are permitted to visit employees at their home.⁸⁵ Neither the Act nor the Rules and Regulations, moreover, limit the number of visits or the number of union representatives in any particular visit.⁸⁶ Consequently, many employees are left with “an unrebutted story, a one-sided story, not necessarily an accurate one.”⁸⁷

II. A COLOSSAL DECLINE IN UNION MEMBERSHIP

The number of American workers in unions has declined significantly in recent decades.⁸⁸ According to a 2004 Congressional Research Report, “[t]he number of union members peaked in 1979 at an estimated 21.0 million.”⁸⁹ As a percentage, on the other hand, union membership peaked in the mid-1950’s at approximately 35 percent of American workers.⁹⁰ In 2010, that number slipped to a seventy-year low of 11.9 percent.⁹¹ One commentator characterized this decline as “exceptional in comparison to other labor movements.”⁹² Indeed, the decline of the American labor movement began much earlier and has been much more severe as compared to other western nations, “leading to substantially lower levels of collective bargaining coverage than elsewhere.”⁹³

What caused this colossal decline in union membership? The change may be explained, in part, by recent large-scale layoffs—particularly in the construction, manufacturing, education, and local government sectors.⁹⁴ One commentator offered this additional justification: “[I]n an increasingly globalized, very fast-moving world, unionized companies may not be able to adjust as quickly.”⁹⁵

⁸⁴ EPSTEIN, *supra* note 54, at 43.

⁸⁵ *See id.* at 42 (“Multiple home visits are permitted to unions but not management.”).

⁸⁶ *See id.* at 42–43 (explaining that multiple home visits are permitted and nothing limits the number of union representatives in any visit).

⁸⁷ PUBLIC MEETING, *supra* note 44, at 55 (statement of Peter Kirsanow).

⁸⁸ MAYER, *supra* note 3, at 10.

⁸⁹ *Id.*

⁹⁰ *Id.* at 12.

⁹¹ Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/business/22union.html>.

⁹² John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82, 82 (2009).

⁹³ *Id.*

⁹⁴ Greenhouse, *supra* note 91.

⁹⁵ *Id.* (quoting Barry T. Hirsch). A unionized workforce is more expensive for an employer to maintain, *see* MAYER, *supra* note 3, at 6 (“[M]ost studies find that, after controlling for individual, job, and labor market characteristics, the wages of union workers are in the range

Moreover, “immutable economic forces,” “shifts in labor force composition,” and the failure of unions to adjust to “economic realities” may have caused the decline.⁹⁶ Finally, because they are protected by a host of federal laws aimed at a wide variety of workplace conduct, employees may not feel the need for union protection.⁹⁷

Employers may also be partly responsible. “[They] have become more sensitive to employee concerns, resulting in greater job satisfaction among nonunion workers and reducing the demand for unionization.”⁹⁸ Many employers, moreover, have become more “aggressive”⁹⁹ and “sophisticated”¹⁰⁰ in their resistance to unionization.

Finally, there is the argument made by many labor organizations—that the enormous decline can be attributed to an unfair election process. As Richard Trumka, president of the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) stated, “[o]ur current system has become a broken, bureaucratic maze that stalls and stymies workers’ choices.”¹⁰¹ Kimberly Brown, Executive Director of American Rights at Work, expressed a similar opinion: “When employees want to vote, they should have a fair chance to do so. As the countless workers who have seen their hopes for a better life deferred again and again know all too well, justice delayed is truly justice denied.”¹⁰² Professor Epstein, however, has voiced an alternative view: “[I]t is clear that the decline in unionization cannot be attributed to any of the rules governing campaigns, which have been stable in form for well over forty years.”¹⁰³ In any event, by

of 10 [percent] to 30 [percent] higher than the wages of nonunion workers.”), and reduces its rate of profit. *Id.* at 10.

⁹⁶ See Godard, *supra* note 91, at 83, 100 (citations omitted) (discussing explanations for the American labor movement’s decline).

⁹⁷ See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006); Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (2006); Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2006); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e–17 (2006).

⁹⁸ MAYER, *supra* note 3, at 17.

⁹⁹ See Greenhouse, *supra* note 91 (quoting Mr. Hirsch as saying “companies have grown more . . . aggressive about resisting organizing drives”).

¹⁰⁰ See MAYER, *supra* note 3, at 17 (“[M]anagement may have become more sophisticated in opposing attempts by workers to unionize.”).

¹⁰¹ Greenhouse, *supra* note 1, at B3 (quoting Mr. Trumka).

¹⁰² PUBLIC MEETING, *supra* note 44, at 300–01 (statement of Kimberly Freeman Brown).

¹⁰³ EPSTEIN, *supra* note 54, at 43. Professor Epstein also argued that “any effort to attribute the decline in the American market to distinctive factors of our own system of labor law sorely misses the point. Larger, global trends are very much in evidence, which undercut the key union claim that distinctive American bargaining procedures drive the current decline in union

proposing sweeping amendments to existing election procedures in June 2011,¹⁰⁴ the Board revealed its own major objections to the process.

III. THE NLRB PROPOSES FAR-REACHING AMENDMENTS TO ITS REPRESENTATION ELECTION RULES

On June 21, 2011, the Board proposed extensive reforms to the procedures that it employs during representation elections.¹⁰⁵ According to the Board, “[t]he proposed amendments [were] designed to fix flaws in the Board’s current procedures that built in unnecessary delays, allow[ed] wasteful litigation, and fail[ed] to take advantage of modern communication technologies.”¹⁰⁶ Anne Marie Lofaso, Professor of Law at West Virginia University,¹⁰⁷ praised the proposals in that, “while modest, [they would] go a long way toward fixing the well-known problems associated with the current election rules.”¹⁰⁸ Below is a brief synopsis of the proposed amendments.

A. Substance of the New Amendments and What the NLRB Hopes to Accomplish

First, and perhaps most significantly, the proposals would streamline election procedures.¹⁰⁹ Under the current rules, parties may seek Board review of pre-election rulings “even though such requests are rarely filed, even more rarely granted, and almost never result in a stay of the election.”¹¹⁰ As a result, most union elections are held several weeks after the filing of an election petition.¹¹¹ The revised

membership.” *Id.* at 13. See *id.* at 10–20, for a more detailed analysis of the union membership decline.

¹⁰⁴ See Representation—Case Procedures, 76 Fed. Reg. 36,812 (June 22, 2011) (to be codified at 29 C.F.R. pts. 101, 102, and 103) [hereinafter *Proposed Amendments*].

¹⁰⁵ *Proposed Amendments to NLRB Election Rules and Regulations Fact Sheet*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/print/525> (last visited Mar. 3, 2012) [hereinafter *Fact Sheet*]. These proposals took up thirty-six pages in the Federal Register. See *Proposed Amendments*, *supra* note 104.

¹⁰⁶ *Fact Sheet*, *supra* note 105; see also Greenhouse, *supra* note 1, at B3 (explaining that the Board seeks with these amendments to “tighten the [election] process by ensuring the employers, employees and unions receive needed information sooner and by delaying litigation over many voter-eligibility issues until after [the election]”).

¹⁰⁷ Anne Marie Lofaso, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, http://law.wvu.edu/faculty/full_time_faculty/anne_m_lofaso (last visited Mar. 3, 2012).

¹⁰⁸ PUBLIC MEETING, *supra* note 44, at 36 (statement of Anne Marie Lofaso).

¹⁰⁹ *Fact Sheet*, *supra* note 105.

¹¹⁰ *Id.*

¹¹¹ *Id.* (“Elections routinely are delayed 25-30 days”); Estreicher, *supra* note 41, at 5 (observing that, in 2008, elections were held in a median of 28 days after the union filed an election petition).

rules, by eliminating pre-election requests for review, aim to eliminate this “unnecessary” delay.¹¹² The Board did not expressly dictate a timeline for the conduct of an election. But Member Hayes indicated in his dissent that the expedited process would result in elections taking place between ten and twenty-one days after the filing of a petition.¹¹³

The proposals second seek to facilitate compliance assistance. Current election procedures mandate that both a copy of the election petition and notice of any pre-election hearing be served upon each party.¹¹⁴ Under the revised procedures, these documents would be accompanied by a description of NLRB representation election procedures and a Statement of Position Form.¹¹⁵ This requirement is intended to help parties understand the process and identify the issues they may want to raise at the pre-election hearing.¹¹⁶

Third, the proposals would make Board pre- and post-election hearing dates “explicit and uniform.”¹¹⁷ These dates are currently unpredictable and vary by region.¹¹⁸ Absent special circumstances, the proposed amendments would have pre-election hearings begin seven days after a hearing notice is served on the parties.¹¹⁹ Post-election hearings, moreover, would begin fourteen days after the ballots are tallied.¹²⁰

Fourth, the proposals seek to ensure that pre-election hearings are limited to resolving genuine disputes.¹²¹ There are presently no mechanisms in place to narrow the issues addressed during pre-election hearings.¹²² Although section 11217 of the Casehandling Manual provides that “[p]rior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard,” such practice is voluntary and, consequently, is not uniformly followed.¹²³ The proposed rules

¹¹² *Fact Sheet*, *supra* note 105.

¹¹³ *See Proposed Amendments*, *supra* note 104, at 36,831.

¹¹⁴ NLRB Rules and Regulations, 29 C.F.R. § 102.63(a) (2011).

¹¹⁵ *Proposed Amendments*, *supra* note 104, at 36,838 (to be codified as 29 C.F.R. § 102.63(a)(1)). The Board identified the purpose of a Statement of Position form as follows: “[The] form would solicit the parties’ position on the Board’s jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing.” *Id.* at 36,821.

¹¹⁶ *Fact Sheet*, *supra* note 105.

¹¹⁷ *Proposed Amendments*, *supra* note 104, at 36,821.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 36,838 (to be codified as 29 C.F.R. § 102.63(a)(1)).

¹²⁰ *Id.* at 36,844 (to be codified as 29 C.F.R. § 102.69(b)).

¹²¹ *Id.* at 36,822.

¹²² *Fact Sheet*, *supra* note 105.

¹²³ *Proposed Amendments*, *supra* note 104, at 36,814.

would *require* parties to state their positions on all issues to be litigated no later than the start of the hearing and before any evidence is presented.¹²⁴ A hearing officer would determine whether a genuine issue exists, as opposed to the Regional Director, who would have discretion regarding the presentation of witnesses or introduction of relevant evidence.¹²⁵ Finally, parties would lose their ability to later litigate any issues other than the ones raised in a Statement of Position or in response thereto.¹²⁶

Fifth, the proposals intend to reduce unnecessary litigation.¹²⁷ Under current practices, pre-election hearings are often devoted to voter-eligibility issues that “may not affect the outcome of the election and thus ultimately may not need to be resolved.”¹²⁸ Under the proposed amendments, however, those eligibility issues involving less than 20 percent of the bargaining unit would be deferred until after the election.¹²⁹ The Board justified this proposal in that:

[D]eferring both the litigation and resolution of eligibility and inclusion questions affecting no more than 20 percent of eligible voters represents a reasonable balance of the public’s and parties’ interest in prompt resolution of questions concerning representation and employees’ interest in knowing precisely who will be in the unit should they choose to be represented.¹³⁰

Sixth, the proposals would consolidate requests for review of all Regional Director’s decisions.¹³¹ Under current election rules, parties

¹²⁴ See *id.* at 36,841 (to be codified as 29 C.F.R. § 102.66(a)(1) (“[A]fter the employer completes its Statement of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statement. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions”); *Fact Sheet*, *supra* note 105 (“The parties would be required to state their positions no later than the start of the hearing”).

¹²⁵ *Proposed Amendments*, *supra* note 104, at 36,841 (to be codified as 29 C.F.R. § 102.66(a)) (“Any party shall have the right to appear at any hearing . . . and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute as to a material fact.”).

¹²⁶ The proposed rules provide for two exceptions to this general mandate. Parties are not precluded from contesting or presenting evidence related to the Board’s statutory jurisdiction to process the election petition. *Id.* at 36,841 (to be codified as 29 C.F.R. § 102.66(c)). Nor are they precluded from later litigating voter-eligibility issues. *Id.*

¹²⁷ *Fact Sheet*, *supra* note 105.

¹²⁸ *Id.*

¹²⁹ See *Proposed Amendments*, *supra* note 104, at 36,841 (to be codified as 29 C.F.R. § 102.66(d)) (“If at any time during the [pre-election] hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing.”).

¹³⁰ *Id.* at 36,824.

¹³¹ *Id.* at 36,817.

must request Board review of pre-election rulings before the election and, if they fail to do so, they then waive that right.¹³² The revised rules would allow parties to seek review of those and post-election rulings—which have always been addressed separately—through a “single, post-election request.”¹³³ Special permission to appeal to the Board will be granted only in those “extraordinary circumstances where it appears that the issue will otherwise evade review.”¹³⁴ These revisions would, moreover, make Board review of both pre- and post-election decisions discretionary—leaving final decisions about many disputed issues to the Regional Director.¹³⁵

Lastly, the proposals are intended to facilitate communication between the union and employees in the proposed unit. The Board contends that “employers are, with increasing frequency, using e-mail to communicate with employees about the vote.”¹³⁶ Accordingly, the revised election procedures would require the employer provide the union not only a final list of employee names and addresses, as is currently mandated, but also the personal telephone numbers and e-mail addresses of those employees, if available.¹³⁷

B. A Controversial Announcement: Reactions to the New Amendments

Rulemaking may very well be the superior law-making mechanism, as described in Part I. This section, however, argues that the Board’s use of the formal rulemaking process in this instance fails because it did not permit ample reflection and the amendments themselves provide insufficient time for employers to communicate their views on unionization, require the disclosure of personal employee information, and unfairly benefit unions.

The public outcry that followed the June 22 publication of the proposed amendments, however, raised serious questions as to the Board’s reasoning and decision-making process.¹³⁸ The proposed

¹³² See NLRB Rules and Regulations, 29 C.F.R. § 102.67(f) (2011) (“Failure to request review shall preclude such parties from relitigating [sic] . . . any issue which was, or could have been, raised [at the hearing].”).

¹³³ *Fact Sheet*, *supra* note 105; see also *Proposed Amendments*, *supra* note 104, at 36, 842–45 (to be codified as 29 C.F.R. §§ 102.67 and 102.69) (eliminating parties’ right to file pre-election request for review of Regional Director decision).

¹³⁴ *Proposed Amendments*, *supra* note 104, at 36,840 (to be codified as 29 § C.F.R. 102.65(c)).

¹³⁵ See *id.* at 36,837, 36,844–45 (to be codified as 29 C.F.R. §§ 102.62(b) and 102.69(d)) (setting forth the process under which a party may request Board review of a Regional Director ruling).

¹³⁶ *Id.* at 36,820.

¹³⁷ *Id.* at 36,838 (to be codified as 29 C.F.R. § 102.62(d)).

¹³⁸ This is in sharp contrast to the careful and prolonged consideration given to collective bargaining units in healthcare facilities. See *supra* text accompanying note 33.

amendments were quickly dubbed by opponents as the “quickie,” “ambush,”¹³⁹ and “microwave election”¹⁴⁰ rule. In a memorandum to House Republicans, moreover, House Majority Leader Eric Cantor included the proposal in a list of the ten most harmful regulations proposed by the Obama administration.¹⁴¹ Other commentators accused the Board of acting pursuant to a politically motivated agenda. Phil Kerpen, author of *Democracy Denied*, commented that “what the NLRB is doing is not the action of one rogue agency or a few envelope-pushing employees so much as it is a deliberate strategy to use the federal government’s regulatory powers to achieve what Obama and his political supporters want without having to bother with going to Congress first.”¹⁴² In all, the Board received more than 65,000 public comments relating to the proposals.¹⁴³

The Board invited comments on its proposed amendments through a contentious public hearing held on July 18 and 19.¹⁴⁴ More than sixty speakers from the business, labor, academic, and advocacy communities participated in the hearing.¹⁴⁵ Overall, the proposals “[were] backed by labor but heavily criticized by business groups.”¹⁴⁶ Employer representatives found no justification for changing current election procedure. Maurice Baskin, speaking on behalf of the

¹³⁹ *AGC Urges NLRB to Withdraw “Quickie Election” Rule*, AGC OF AMERICA (Aug. 23, 2011), <http://news.agc.org/2011/08/23/agc-urges-nlr-to-withdraw-%E2%80%9Cquickie-election%E2%80%9D-rule/>.

¹⁴⁰ John Hayward, *NLRB Backs Off On Microwave Union Elections*, HUMAN EVENTS (Nov. 30, 2011), <http://www.humanevents.com/article.php?id=47843>.

¹⁴¹ Kevin Bogardus, *House Republicans Paint Target on NLRB’s Proposed Union Election Rules*, THE HILL (Sept. 5, 2011), <http://thehill.com/business-a-lobbying/179509-house-gop-paints-target-on-proposed-union-election-rules>.

¹⁴² Peter Roff, *Out of Control NLRB Strikes Again*, U.S. NEWS & WORLD REPORT (Nov. 29, 2011), <http://www.usnews.com/opinion/blogs/peter-roff/2011/11/29/out-of-control-nlr-strikes-again>; see also Peck, *supra* note 39, at 259 (arguing that, although the Board must inevitably make some politically-inspired policy-making decisions, such decisions “should be kept at the minimum necessary for effective discharge of the Board’s functions”); Carl Horowitz, *House Overrides NLRB’s Ambush-Election, Micro-Union Positions*, NATIONAL LEGAL AND POLICY CENTER (Dec. 8, 2011), <http://nlpc.org/stories/2011/12/08/house-overrides-nlrbs-ambush-election-micro-union-positions> (“Unable to get Congress to enact his labor initiatives, [President Obama] has made appointments to the NLRB and the Labor Department who are committed to producing the equivalent of such legislative outcomes as much as possible.”).

¹⁴³ *NLRB Issues Final Rule on Union Elections; Business Groups Respond With Lawsuit*, THE BUREAU OF NATIONAL AFFAIRS, INC. (Dec. 23, 2011), <http://www.bna.com/nlr-issues-final-n12884906645/>. The AFL-CIO alone submitted more than 21,000 comments in support of the proposed amendments. Bogardus, *supra* note 141.

¹⁴⁴ See PUBLIC MEETING, *supra* note 44 for a full transcript of the proceeding.

¹⁴⁵ *Details Released on July 18-19 Open Meeting About Proposed Election Rule Amendments*, NATIONAL LABOR RELATIONS BOARD (July 8, 2011), <https://www.nlr.gov/news/details-released-july-18-19-open-meeting-about-proposed-election-rule-amendments>.

¹⁴⁶ Bogardus, *supra* note 141.

Associated Builders and Contractors Inc., questioned whether the Board had been given “a full appreciation of the sense of outrage in the business community.”¹⁴⁷ He also commented that, “in the midst of this terrible economy, the NLRB [should not be] proposing new and burdensome regulations that appear to have no purpose other than to promote union organizing.”¹⁴⁸ The following sections discuss the most prominent objections.

1. Inadequate Thought and Consideration

As a threshold issue, many employer representatives criticized the Board for its failure to proceed with the caution mandated by formal rulemaking. Representing the Society for Human Resource Management, Roger King commented that “[there is] simply not a record for the proposed rules,” and asked the Board to “reconsider the speed with which [it is] proceeding and give much more thought and consideration to what [it is] doing.”¹⁴⁹ Another speaker, noting that the rules would impact approximately one hundred million employees, suggested that the Board “take a little bit more than two days to hear what everybody has to say face-to-face.”¹⁵⁰

Others questioned the authority of a two-person majority to issue such comprehensive amendments. Mr. Baskin explained to the Board that “[there is] outrage over the haste with which you are moving ahead with these sweeping and radical proposals, . . . particularly without a full board of confirmed members.”¹⁵¹ Other speakers offered that “it is untimely for a Board majority, which will soon be composed of only two members, one whom sits by recess appointment, to propose and consider any rule, especially such a far-reaching rule that substantially and fundamentally changes the provisions of the Act.”¹⁵²

It should be noted that two Board members alone lack legal authority to issue new regulations and rulings.¹⁵³ Recall that the recess

¹⁴⁷ PUBLIC MEETING, *supra* note 44, at 271 (statement of Maurice Baskin).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 236, 240 (statement of Roger King).

¹⁵⁰ *Id.* at 88 (statement of Oliver Bell).

¹⁵¹ *Id.* at 271 (statement of Maurice Baskin).

¹⁵² *Id.* at 286 (statement of Harold Weinrich). Member Hayes would later articulate this same position: “[I]t would ‘contravene long-standing’ board rules for a two-person majority to adopt such a sweeping decision.” Steven Greenhouse, *Republican Might Quit Labor Board*, N.Y. TIMES, Nov. 23, 2011, at B1. Existing procedures could not, in his opinion, “simply be cast aside in pursuit of a singular policy agenda without doing irreparable harm to the board’s legitimacy.” *Id.*

¹⁵³ See *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2645 (2010) (“If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress’ decision to require that the Board’s full power be delegated to no fewer than three

appointment of Member Becker was set to expire in January 2012. Thus, the Democratic majority was motivated to act expeditiously, at least in part, out of concern that it would soon lose its authority to vote on the proposed amendments.¹⁵⁴ The hastiness with which these amendments were issued does little to engender confidence in Board rules.

2. *Unreasonable Time Frame*

Employer representatives also criticized the shortening of the pre-election time period in that it would provide insufficient time for employers to communicate with employees regarding the pros and cons of unionization.¹⁵⁵ This argument was first articulated by Member Hayes in his dissent: “[T]he majority has announced its intent to provide a more expeditious preelection [sic] process and a more limited postelection [sic] process that tilts heavily against employers’ rights to engage in legitimate free speech.”¹⁵⁶ One speaker similarly contended that, “[u]nless an employer has an adequate opportunity to fully utilize its free speech rights between the time a petition is filed and an election is held, employees’ rights are destroyed, and the employer’s free speech rights become meaningless.”¹⁵⁷ Another, detailing the right employees have to receive information opposing unionization, noted that “[t]here is an inseparable bond between a fair election and the right to be informed.”¹⁵⁸ As for employers, on the other hand, the revised rules

members, and to provide for a Board quorum of three, must be given practical effect rather than swept aside in the face of admittedly difficult circumstances.”).

¹⁵⁴ See Greenhouse, *supra* note 152, at B1 (“With Senate Republicans vowing to block any replacement nominees, the board will have only two of the five members it is supposed to have — not enough to issue any decisions or rules.”).

¹⁵⁵ Chairman Pearce contended, however, that the revisions would affect only 10 percent of elections: “The vast majority of NLRB-supervised elections, about 90 percent, are held by agreement of the parties . . . in an average of 38 days from the filing of a petition.” Tim Devaney, *GOP seeks to head off NLRB rules*, WASH. TIMES, Nov. 30, 2011, at A10. “[T]he amendments would apply to the minority of elections which are held up by needless litigation and disputes which need to be resolved prior to an election In these contested elections, employees have to wait an average of 101 days to cast a ballot.” *Id.*

¹⁵⁶ *Proposed Amendments*, *supra* note 104, at 36,833. Hayes further cautioned that the shorter election process will “stifle full debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation.” *Id.* at 36,829.

¹⁵⁷ PUBLIC MEETING, *supra* note 44, at 285 (statement of Harold Weinrich).

¹⁵⁸ *Id.* at 392 (statement of Jay Krupin); see also GOULD, *supra* note 9, at 47 (“It is hoped that the choice [of whether or not to unionize] will be an informed one.”). The Supreme Court has held that employees have an implicit right to receive information opposing unionization. *Chamber v. Brown*, 128 S. Ct. 2408, 2414 (2008) (concluding that Section 157 of the Act, which references the right of employees to refuse to join unions, “implies an underlying right to

“unduly and severely cut into the time that [they] have to communicate with employees during an election campaign, when their right to do that is at its greatest and most important.”¹⁵⁹

Some speakers argued, moreover, that a shortened election process would harm many small employers. As Tom Coleman, speaking for the Printing Industries of America, indicated, “[t]hey don’t have access to good sound advice and counsel as how to live within the rules, and they don’t have the opportunity to get guidance on how they can communicate with their employees.”¹⁶⁰ Robert Garbini, President of the National Ready Mix Concrete Association, further explained that, where legal counsel specializing in union campaigns is not readily accessible, the truncated time frame will “lead to a greater number of pre- and post-election complaints and possibly unfair labor practices due to objectionable actions on part of the employers who are unfamiliar with the intricate and confusing laws and rules governing union elections.”¹⁶¹

Union representatives countered that an expedited election process would reduce the opportunity for employers to game the system and use procedural delay to intimidate employees. One speaker argued that “management is not concerned about workers’ rights, but, [instead], they’re more concerned with keeping 100 percent control of their business to do whatever they want whenever they want at all cost.”¹⁶² In response to these accusations, Stephen Jones, Director of Human Resources for Chandler Concrete Company, suggested that the Board punish those particular employers with increased sanctions. “Deal with the bad apples,” he argued, “[d]on’t replace or go in and replant the orchard.”¹⁶³

The shortened election process will surely hinder employers in their ability to communicate their views about unionization and, consequently, deprive employees of their right to make an informed decision. Allowing unions an unfair advantage in the representation

receive information opposing unionization”).

¹⁵⁹ PUBLIC MEETING, *supra* note 44, at 422 (statement of David Kadela). “Why the need to rush?” asks Wyoming Senator Mike Enzi, ranking Republican on the Senate Health, Education, Labor and Pensions Committee. “If employees want to unionize they should be allowed to do so, but to ram elections through before important questions are asked or answered does a disservice to everyone involved.” Sam Hananel, *Rules Would Speed Up Union Elections*, ABC NEWS (June 21, 2011), <http://abcnews.go.com/US/wireStory?id=13896394#.TwZUMtRbe8A>.

¹⁶⁰ PUBLIC MEETING, *supra* note 44, at 307–08 (statement of Francis T. “Tom” Coleman).

¹⁶¹ *Id.* at 160 (statement of Robert Garbini).

¹⁶² *Id.* at 337–38 (statement of Lexer Quamie); *see also id.* at 38 (statement of Anne Marie Lofaso) (“The amendments eliminate unnecessary bureaucratic delay, thereby diminishing opportunities for unscrupulous parties to take advantage of systemic delay.”).

¹⁶³ *Id.* at 316–17 (statement of Stephen Jones).

election process could undermine election results and, as a result, the legitimacy of the union itself.

3. *Invasion of Privacy*

Employer representatives also objected to the expanded *Excelsior* list requirements, namely the disclosure of personal telephone numbers and e-mail addresses, in that they contemplate a serious invasion of personal privacy. William Messenger, speaking for the National Right to Work Legal Defense Foundation, predicted that “[most employees] would likely be appalled to learn that a government agency is contemplating handing out their personal information to a third-party special interest group without their consent, or even potentially over their objection.”¹⁶⁴ He went on to suggest that “employees’ personal privacy outweighs any kind of attempt to balance the electoral campaign between unions and employers.”¹⁶⁵ Another speaker criticized the proposed requirement in that it “go[es] far beyond disclosing one’s home address where [the employee] can simply shut the door, go back to dinner, and be done with it.”¹⁶⁶ Instead, forcing the employee to delete hundreds of text messages and e-mails will disrupt the workplace and intrude on his right to privacy.¹⁶⁷ Mr. Baskin offered, moreover, that the two-day period for producing *Excelsior* material is impossible, particularly with respect to laid off employees whose information may not be readily available to the employer.¹⁶⁸

Employees have a legitimate right to privacy. The union’s interest in contacting the bargaining unit does not overshadow that right. At the very least, employees should have a choice as to whether or not to provide their personal contact information and expose themselves to potential harassment.

4. *The Creation of an Unequal Playing Field*

Lastly, many comments touched on whether the proposed revisions would allow unions an unfair advantage in that they have unlimited time prior to the election petition to communicate their views, whereas employers would only have the brief time between receiving notice of the petition and the election itself. Peter Kirsanow, counsel for the National Association of Manufacturers, observed that:

¹⁶⁴ *Id.* at 344 (statement of William Messenger).

¹⁶⁵ *Id.* at 349.

¹⁶⁶ *Id.* at 108 (statement of Ron Holland).

¹⁶⁷ *Id.* at 108–09.

¹⁶⁸ *Id.* at 274 (statement of Maurice Baskin).

It takes many, if not most, employers, even the larger ones, up to two weeks to figure out what it is that they even want to say about the particular issue, and thereafter, they'll have three to four [] weeks to communicate that message to employees, in contrast to the [thirty] to [forty] weeks the union may have already used to communicate its message.¹⁶⁹

As one speaker theorized, “[i]f unions were required to notify the employer at the outset of their campaign, that would be one thing, but often the first the employer . . . learn[s] of the campaign is upon receipt of the petition.”¹⁷⁰ Employers are already disadvantaged in their ability to conduct anti-union campaigns and, under the proposed amendments, would be disadvantaged even further. Representation elections facilitate the employee’s choice as to whether or not to unionize. Employees will find little protection, however, in a flawed election process.

C. A Congressional Blockade

The contentious debate exhibited during the public hearing quickly reached the halls of Congress. House Republicans rallied behind legislation intended to block the proposed union election rules.¹⁷¹ Representative John Kline, chairman of the House Education and the Workforce Committee, was particularly vigilant in the battle against Big Labor.¹⁷² He proposed a bill that would pre-empt any attempt at an expedited election by requiring at least fourteen days before a pre-election hearing could be held, allowing employers time to find legal counsel, and a minimum of thirty-five days before balloting.¹⁷³ His bill would also bar unions from requiring employers to provide employee telephone numbers and e-mail addresses.¹⁷⁴

The House Education and the Workforce Committee voted in November to approve the bill.¹⁷⁵ It passed in the House by a 235–188 vote.¹⁷⁶ According to numerous commentators, however, the bill is not likely to fair well in the Democratic-controlled Senate.¹⁷⁷

¹⁶⁹ *Id.* at 54–55 (statement of Peter Kirsanow).

¹⁷⁰ *Id.* at 42 (statement of Eric Schweitzer).

¹⁷¹ Bogardus, *supra* note 141.

¹⁷² Kevin Diaz, *Rep. Kline Opens New Front on Labor Fight*, STAR TRIBUNE, Oct. 6, 2011, at 4A (“[Kline has] thrust himself into a growing GOP battle with organized labor.”).

¹⁷³ The Workforce Democracy and Fairness Act, H.R. 3094, 112th Cong. §§ 2(2)(A) and 2(2)(C)(ii) (2011).

¹⁷⁴ *See id.* at § 2(2)(D) (allowing the employee to choose his preferred mode of communication).

¹⁷⁵ Greenhouse, *supra* note 152, at B1.

¹⁷⁶ 157 CONG. REC. H7985–7986 (Nov. 30, 2011).

¹⁷⁷ *See, e.g.,* Steven Greenhouse, *Republican Might Quit Labor Board*, N.Y. TIMES, Nov.

D. Member Hayes Threatens to Resign

On November 18, 2011, the Board announced that it would hold a public session later that month to vote on the proposed union election rules. In response, Member Hayes threatened not to attend the session, which would deprive the Board of the quorum needed to vote on the rules.¹⁷⁸ Hayes alleged that Members Pearce and Becker had been less than candid regarding the final revisions they planned to make and had not adequately shared with him the public comments they received.¹⁷⁹ Peter Schaumber, former Board chairman, supported this choice: “[Hayes] can’t be forced under these circumstances to participate in a judicial charade.”¹⁸⁰

But this public threat was not universally commended. Chairman Pearce criticized Hayes for making “false or misleading allegations” and publicizing an internal matter.¹⁸¹ Representative George Miller, senior Democrat of the House Education and the Workforce Committee, also denounced the decision in that “[Hayes] voluntarily chose not to participate in the shaping of the rules and the deliberations, and now he’s complaining about it.”¹⁸²

Hayes kept observers guessing as to whether he would attend the session.¹⁸³ He ultimately decided, however, to participate in the vote. “It is not my nature to be obstructionist,” he explained.¹⁸⁴ “I believe resignation would cause the very same harm and collateral damage to the reputation of this agency.”¹⁸⁵

E. An Imperfect Resolution: The Final Amendments

The Board, in an attempted compromise, ultimately voted to adopt a watered-down version of the proposed amendments.¹⁸⁶ The 2–1 vote was as expected: Members Pearce and Becker supporting the proposal

22, 2011, <http://www.nytimes.com/2011/11/23/business/brian-e-hayes-threatens-to-quit-labor-board.html?pagewanted=all> (“[A]pproval by the Democratic-controlled Senate is doubtful.”); Devaney, *supra* note 155, at A10 (“[T]he bill” could end up being benched by the Senate.”).

¹⁷⁸ Greenhouse, *supra* note 152, at B1; *see also supra* note 153 and accompanying text (explaining that no fewer than three Board members may issue new regulations).

¹⁷⁹ Greenhouse, *supra* note 152, at B1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Tim Mak, *NLRB approves union election rule*, POLITICO.COM (Nov. 30, 2011), <http://www.politico.com/news/stories/1111/69459.html>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (“Because of [its] impending deadline, the NLRB, ahead of [the November 30] vote, stripped its proposed rule on union elections of the more controversial aspects that had previously been proposed.”).

and Member Hayes voting no.¹⁸⁷ In a press release that same day, Representative Kline made his continued opposition to the amendments clear: “Ignoring the will of Congress and objections raised by countless organizations representing workers and employers, the NLRB has chosen to deliver a final ambush election rule to its Big Labor allies.”¹⁸⁸ The six amendments formally adopted by the Board provide as follows:

1. Hearing officers at pre-election hearings are given the authority to limit the proceeding to issues relevant to whether an election is appropriate.¹⁸⁹
2. Post-hearing briefs may be filed “only upon special permission of the hearing officer,” when the case presents issues that would benefit from such briefing.¹⁹⁰ The hearing officer is given further discretion over the subjects to be addressed and the time for filing.¹⁹¹
3. Appeals concerning both pre- and post-election issues are consolidated into a “single post-election procedure” and, thus, “avoid[] altogether appeals of issues that become moot as a result of the election.”¹⁹²
4. The recommendation that the Regional Director should delay the scheduling of elections at least twenty-five days to permit time for a pre-election appeal is discontinued.¹⁹³ Section 101.21 currently reads as follows: “[U]nless a waiver is filed, the Director will normally not schedule an election

¹⁸⁷ *Id.* The final amendments were published in the Federal Register on December 22, 2011. See *Final Amendments*, *supra* note 49. They will take effect on April 30, 2012. *Id.*

¹⁸⁸ Press Release, John Kline (Dec. 21, 2011), <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=273371>; see also Melanie Trotman, *Board Scales Back Union-Vote Plan*, WALL ST. J., Nov. 30, 2011, at A8 (reporting that the scaled-back version “did little to quell concerns among employers who have opposed the measure since it was unveiled in June”).

¹⁸⁹ *Final Amendments*, *supra* note 49, at 80,185 (to be codified as 29 C.F.R. § 102.66(a)) (“Any party shall have the right to appear at any hearing . . . , to call, examine, and cross-examine witnesses, and to introduce into the record documentary and other evidence so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election.”).

¹⁹⁰ *Id.* at 80,185 (to be codified as 29 C.F.R. § 102.66(d)); *Explanation of Resolution*, NATIONAL LABOR RELATIONS BOARD, <http://www.nlr.gov/print/3093> (last visited Mar. 3, 2011).

¹⁹¹ *Final Amendments*, *supra* note 49, at 80,185 (to be codified as 29 C.F.R. § 102.66(d)).

¹⁹² *Explanation of resolution*, *supra* note 190; see also *Final Amendments*, *supra* note 49, at 80,185–88 (to be codified as 29 C.F.R. §§ 102.67 and 102.69 (eliminating parties’ right to file pre-election request for review of Regional Director decision)).

¹⁹³ *Final Amendments*, *supra* note 49, at 80,181 (“Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.”).

until a date between the 25th and 30th day after the date of the decision, to permit the Board to rule on any request for review which may be filed.”¹⁹⁴

5. The circumstances under which a request for special permission to appeal to the Board will be granted are made explicit.¹⁹⁵ In particular, “[t]he Board will not grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review.”¹⁹⁶

6. The appeal procedure is simplified in that Board review of any appeals relating to the election process is discretionary.¹⁹⁷

Some proposals, however, are noticeably absent from the final amendments. Employers need not provide employee telephone numbers and e-mail addresses.¹⁹⁸ Those provisions requiring the pre-election hearing be set for seven days after service of the hearing notice and a Statement of Position form be filed at the start of the hearing have also been removed. But the limited nature of the resolution does not mean that these proposals have been rejected. They will instead remain under continued consideration by the Board.¹⁹⁹

The United States Chamber of Commerce filed the first federal lawsuit to block the amendments from taking effect. The lawsuit alleged that the revisions violate Board procedures and impermissibly restrict the free speech rights of employers to make the case against unions.²⁰⁰ “It is tragic that the Board would expend its resources in this manner,” opined Randy Johnson, the Chamber’s senior vice president for Labor, Immigration, and Employee Benefits, “creating more confusion and uncertainty under our nation’s labor laws, aiding only unions and perhaps lawyers, rather than focusing on some type of initiative that would encourage job growth.”²⁰¹ It is unlikely, given

¹⁹⁴ NLRB Rules and Regulations, 29 C.F.R. § 101.21 (2011).

¹⁹⁵ *Final Amendments*, *supra* note 49, at 80,184 (to be codified as 29 C.F.R. § 102.65).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 80,183, 80,187 (to be codified as 29 C.F.R. §§ 102.62(b) and 102.69(d)) (providing for discretionary Board review).

¹⁹⁸ *Explanation of resolution*, *supra* note 190.

¹⁹⁹ *Id.*

²⁰⁰ Steven Greenhouse, *Labor Board Adopts Rules to Speed Unionization Votes*, N.Y. TIMES, Dec. 22, 2011, at B5.

²⁰¹ Press Release, U.S. Chamber of Commerce, *U.S. Chamber Blasts NLRB For ‘Gift to Organized Labor’ and Files Lawsuit to Challenge the Rule*, U.S. CHAMBER OF COMMERCE (Dec. 21, 2011), <http://www.uschamber.com/press/releases/2011/december/us-chamber-blasts-nlr-b-E2%80%98gift-organized-labor%E2%80%99-and-files-lawsuit-challen>.

the immense criticism the Board has received thus far, that this lawsuit will be the last.

CONCLUSION

The NLRB could have chosen, consistent with its 75-year history, to amend its representation election procedures through case-by-case adjudication. Instead, the Board chose to issue substantive rules. Rulemaking is an onerous process—it requires preliminary publication in the Federal Register, careful consideration of countless public comments, and a well-reasoned justification for the new rule.²⁰² But these procedural safeguards have the potential to garner stability and confidence in Board rules, ensure political accountability, and enhance policy making.²⁰³ Unfortunately, the Board has achieved none of these goals here. Even the watered-down version of these amendments are unprecedented, sweeping, and unfair. They put employers at an extreme disadvantage in their ability to express their views about unionization and, as a result, deprive employees of their right to make an informed decision.²⁰⁴ To retain any shroud of legitimacy with the American people, the Board, particularly in light of its current composition,²⁰⁵ must show more restraint and bipartisan diplomacy in the upcoming year.

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²⁰² See *supra* note 27.

²⁰³ See *supra* notes 39–45 and accompanying text.

²⁰⁴ See *supra* Part III.B.1.

²⁰⁵ See *supra* note 26.

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